Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF ATX COMMUNICATIONS, INC. BLUEVISTA PHONE SERVICE

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SUMMARY

To preserve competition for rural phone service, it is imperative that the Commission preserve access to unbundled mass market switching. The Commission is charged by the Telecommunications Act to promote a pro-competitive deregulatory environment for telecommunications, with unbundled access to network elements as the principal mechanism accomplishing this. Moreover, unbundling was a necessary prerequisite for BOC long distance entry, which has now been completely realized.

The benefits of unbundling outweigh its costs -- evidence clearly establishes that access to UNEs does not deter, but rather promotes increased facilities investment by both CLECs and ILECs that has redounded to the benefit of consumers. Unbundling has improved the efficiency of incumbents and new entrants alike, and actually results in incentives for new entrants to move to facilities-based business strategies.

Absence of UNE-P will be detrimental to the public interest, because lack of competition in the markets for which it is best suited will result in higher rates and fewer services for the vast majority of telecommunications customers. Moreover, the barriers to entry to will remain high many markets. Without UNE-P, competition cannot be established or preserved in most markets.

The mandate from the *USTA II* court does not require the Commission to eliminate UNE-P; rather, the Commission is directed to provide more support for its original impairment determination. Ample evidence exists regarding hot cut performance, access to customer information, and overall entry barriers to support continued unbundling of mass market switching, particularly in rural markets. The Commenters propose that the Commission adopt an impairment standard that uses a line-density analysis, applied on an end office basis, that will

establish the threshold at which a carrier is no longer impaired without access to unbundled mass-market switching. This is an easily administrated standard that recognizes practical investment concerns and conforms to the Commission's current impairment considerations, especially in regard to economies of scale, sunk costs, and first mover advantages.

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ATX Communications, Inc. and Bluevista Phone Service, (together "Commenters") submit these comments in the above-captioned proceedings.

I. THE ACT SEEKS TO PROMOTE COMPETITION THROUGH UNBUNDLING

In evaluating whether CLECs are impaired without unbundled access to network elements, the Commission must be guided by the fundamental goals of the Telecommunications Act of 1996 ("Act"). CLECs have already extensively described these goals to the Commission, and the Commission has noted them in previous decisions. While the Commission must necessarily address the specific issues raise by *USTA II*, these do not lessen the requirement that the Commission continue to implement the key objectives of the Act in the manner prescribed by Congress.

First, the Commission must craft unbundling rules that promote a pro-competitive deregulatory environment for telecommunications. As the Supreme Court found in Verizon, the intent of the Act was to "uproot" traditional monopolies, promote "competition in the persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications industry," and "eliminate the monopolies enjoyed by the inheritors of

AT&T's local franchises."[1] The Supreme Court cited to one of the main proponents of the Act who noted that the purpose of the Act is to break up the BOCs' networks and make them available to competitors:

> This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out .... It is kind of almost a jump-start .... I will do everything I have to let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything. Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself.[2]

Second, unbundled access to network elements is a principal mechanism under the Act for promoting competition. The Commission has found that the Act specifically provides for three different modes of competition: resale, UNEs, and building facilities,[3] each which fulfill the goals of the Act. The Act also establishes unbundling as a key approved mechanism for promoting competition by requiring unbundling as a precondition of BOC long distance entry. Section 271 establishes that the ILECs must unbundle key network elements as a continuing condition of providing inter-LATA long distance service.[4] For all practical purposes, the unbundling requirements in both section 251 and section 271 are the cornerstones of the Act's pro-competitive framework.

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1 Verizon Communications Inc. v. FCC, 535 U.S. 467, 467 (2002)(*Verizon*).

2 *Verizon*, 535 U.S. at 488 (*quoting* 141 Cong. Rec. 15572 (1995) (Remarks of Sen. Breaux (La.) on Pub.L. 104-104 (1995)).

3 See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3699, para. 5 (1999) (*UNE Remand Order*), *reversed and remanded in part sub. nom.* United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (USTA), *cert. denied sub nom.* WorldCom, Inc. v. United States Telecom Ass'n, 123 S.Ct 1571 (2003 Mem.).

4 47 U.S.C. § 271(c)(2)(B).

Accordingly, while addressing the narrower issues raised by *USTA II*, the Commission may and should seek to promote competition by providing for appropriate unbundled access to incumbent network elements.

II. THE BENEFITS OF UNBUNDLING OUTWEIGH THE COSTS

In fashioning new unbundling rules, the Commission should also keep in mind that the benefits of unbundling where there is impairment outweigh the costs. Among the benefits of unbundling, marketplace evidence clearly establishes that access to UNEs does not deter, but rather promotes increased facilities investment by both CLECs and ILECs. As noted by the Supreme Court, the competitive industry has invested nearly $55 billion since passage of the Act.[5] In fact, the availability of UNEs is a necessary precondition for facilities investment.[6]

UNE-based competition provides many benefits to consumers and businesses. In a study completed this year, it is estimated that because of the Commission's unbundling rules and the introduction of UNE-P, the United States has seen approximately $10 billion a year in consumer welfare gains.[7] CLECs have been able to use UNEs to provide new and improved services, and existing services at reduced prices. In turn, ILECs have been forced by CLEC competitors to employ new technologies and offer newer services despite their fears that they might be introducing efficiencies that cannibalize their existing services. The threat of competition provides the best incentive for ILECs to invest in new networks. As CLECs have previously pointed out in the Triennial Review proceeding, for example, the ILECs generally failed to

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5 *Verizon*, 535 U.S. at 516

6 *UNE Remand Order* para. 5 ("[T]he ability of requesting carriers to use unbundled network elements, including various combinations of unbundled network elements, is a necessary precondition to the subsequent deployment of self-provisioned network facilities.")

7 See Phoenix Center Policy Bulletin No. 8, The $10 Billion Benefit of Unbundling: Consumer Surplus Gains from Competitive Pricing Innovations (January 27, 2004) (available at <http://www.phoenix-center.org/PolicyBulletin/PCPB8Final.pdf>).

deploy DSL until CLECs began to deploy it. As President Clinton's Council of Economic Advisers stated in early 1999:

> Although DSL technology has been available since the 1980s, only recently did [the ILECs] begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from ... the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.[8]

Or, as stated more succinctly by James Glassman, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher-revenue services.[9] Competition from CLECs thus was pivotal in furthering investment by ILECs that would permit provision of DSL and other advanced services. If CLEC competition is eliminated as a result of changes to the unbundling rules, there is every reason to believe ILECs will return to their old ways of offering dinosaur services at high prices.

Cost-based unbundling is an essential part of Congress' plan to promote efficiency upon the entire industry that would lead to lower prices for consumers. By mandating that ILECs price their UNEs at cost-based prices (plus a reasonable profit), the Act increases ILECs' incentives to make their networks more efficient. If an ILEC has higher costs due to an old, inefficient network or poor management, under the statutory UNE pricing standard it cannot simply pass on these inefficiencies through higher charges to its competitors. Instead, the ILEC must improve the efficiency of its own network and management in order to maximize the profits it can earn

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[8] ALTS New Economy Analysis at 4 (citing Council of Economic Advisers, Economic Report of the President, February 1999, 187-188, (<http://w3.access.gpo.gov/usbudget/fy2000/Pdf/erp.pdf>).

[9] James Glassman, "Best Remedy for Recession? Break Up the Bells," (<http://www techcentralstation.com/NewsDesk.asp?FormMode=MainTemiinalArticles&ID=131>) (December 10, 2001).

through selling UNEs.

Further, unbundling requirements improve the efficiency of new entrants. The sharing of vital, hard-to-duplicate facilities is rooted in both the Act and principles of economic efficiency. As the Supreme Court noted, "entrants may need to share some facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)."[10] The Court went on to add that:

> competition as to "unshared" elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements jointly necessary to provide a desired telecommunications service. Such is the reality faced by the hundreds of smaller entrants (without the resources of a large competitive carrier such as AT & T or WorldCom) seeking to gain toeholds in local-exchange markets, see FCC, Local Telephone Competition: Status as of June 30, 2001, p. 4, n. 13. (Feb. 27, 2002) (485 firms self-identified as competitive local- exchange carriers). Justice Breyer elsewhere recognizes that the Act "does not require the new entrant and incumbent to compete in respect to" elements, the "duplication of [which] would prove unnecessarily expensive," post, at 8. It is in just this way that the Act allows for an entrant that may have to lease some "unnecessarily expensive" elements in conjunction with building its own elements to provide a telecommunications service to consumers.[11]

The Court noted how the availability of costly-to-duplicate network elements at cost-based prices could "avoid the risk of keeping more potential entrants out," while "induc[ing] them to compete in less capital-intensive facilities."[12]

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10 *Verizon*, 535 U.S. at 510.

11 *Id.*

12 *Id.* In fact, Justice Breyer described the philosophy of unbundling as follows:

Thus, unbundling promotes efficient investment – if network elements are "very expensive to duplicate" and the ILEC has already deployed that element, it makes economic sense under the goals of the Act for the CLEC to be able to lease that element on an unbundled basis as opposed to devoting precious, and increasingly scarce, capital to duplicating that element. As the Commission has noted, since TELRIC is a reasonable measure of the incumbent's economic cost of providing a network element it will "encourage new entrants to make efficient decisions whether to lease or build and spur ILEC and CLEC investment." Eliminating unbundling obligations, however, will mean that the CLEC in such a situation must either duplicate inefficiently the facility or not serve the customer.

As the CLEC obtains more customers, its average cost of serving customers will decrease and it will find it more efficient to deploy its own facilities.[13] As the Commission has noted, "the purchase of unbundled network elements from the incumbent should serve as a transitional strategy that will provide requesting carriers with the ability to gain a sufficient volume of business to justify economical deployment of their own facilities."[14]

On the other hand, the costs of unbundling are minimal. While the Commission erred in the Triennial Review Order15 in establishing limits on unbundling for broadband networks based

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[o]ne can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the remaining aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition .....
AT&T v. Iowa Utils. Bd., 525 U.S. 366, 416-417 (1999)(*Iowa Utilities Board*)(Breyer, J., concurring in part, dissenting in part).

13 *UNE Remand Order* para. 79.

14 *Id.* para. 52.

15 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC

in effect on the view that a cost of unbundling was a restraint on ILEC investment, there could be no such claim with respect to the remaining "legacy" portions of the network since that network has already been constructed.

Further, the Supreme Court in Verizon confirmed that ILECs receive compensatory rates for the sale of their facilities and therefore there is no reason to believe that unbundling would prevent them from building new facilities. The Court thoroughly examined and definitively rejected the BOCs' position that provision of unbundled network elements inhibits their, and CLECs', incentives to construct facilities. As the Supreme Court recognized, TELRIC pricing of unbundled network elements provides ILECs with a return that reflects the risks they incur in providing wholesale facilities to their competitors.

TELRIC pricing also provides incentives for CLECs to build their own facilities. As the Supreme Court found, TELRIC rates inherently include inefficiency by requiring cost calculations to include the existing location of incumbent's wire centers. Local-loop elements, as well as other network elements, therefore will not be priced at their most efficient cost and configuration.[16] Since TELRIC intrinsically includes these inefficiencies when pricing network elements, competitive carriers still will have the incentive to increase efficiency and profitability by building their own networks.

TELRIC does not provide network elements at or below cost; rather, the Supreme Court found that TELRIC pricing of unbundled network elements results in CLECs receiving facilities at less favorable rates than if they were to construct their own facilities. Clearly, TELRIC pricing

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Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, para. 530 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003)(*Triennial Review Order*).

[16] *Verizon*, 565 U.S. at 505.

of unbundled network elements does not act as a disincentive but instead encourages competitive carriers to invest in and deploy their own facilities so as to achieve the most efficient cost and network configuration.

While TELRIC pricing does not provide ILECs with the same monopoly rates of return they would otherwise receive, they are fairly compensated for their investment in facilities. To the contrary, the level of facilities investment by both ILECs and CLECs since 1996 confirms that unbundling in fact has spurred new investment, not inhibited it.

Accordingly, in fashioning new unbundling rules the Commission should conclude that a cost-benefit analysis favors unbundling.

III. THE COMMISSION HAS AMPLE CAUSE TO CONTINUE TO UNBUNDLE MASS MARKET SWITCHING

It cannot be emphasized strongly enough that *USTA II* did not find unbundled mass market switching to be inherently unlawful or antithetical to the goals of the Act. *USTA II* merely disapproved of the Commission's overly broad "non-provisional national impairment finding"[17] and the subdelegation of local non-impairment determinations.

Indeed, the court threw out a few lifelines to preserve unbundled mass market switching. For example, it suggested that impairment determinations could be based on the ILEC's track record for speed and volume in performing hot cuts in a market, integrated with some projection of the demand increase that would result from withholding of switches as UNEs.[18] It also accepted the ILECs' own suggestion that the Commission consider "rolling" hot cuts as another

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17 United States Telecom Association v. F.C.C., 359 F.3d 554, 569 (2004)(*USTA II*).

18 *USTA II*, 359 F.3d at 570.

option.[19] Most importantly, the *USTA II* court preserved the Commission's impairment standard, albeit offering some "suggestions" for improvement.

The *USTA II* court suggested that rolling hot cuts would eliminate this disadvantage. In a large market with significant density, this approach might reduce the costs and delays associated with converting the customer to the new carrier. However, this approach does not address the cost concern for the residential customer, and additionally creates the new problem of putting the customer through multiple conversions which often result in service affecting problems. As customers are affected by these service problems they invariably blame the competitor, to the incumbent's advantage.

IV. TO ENSURE THE BENEFITS OF COMPETITION TO MASS MARKET CUSTOMERS, THE COMMISSION SHOULD ADOPT A LINE DENSITY THRESHOLD TRANSITION MECHANISM

Commenters strongly advocate the continuance of UNE-P as a means to enable CLECs to provide a competitive alternative to ILEC services, especially to customers outside of metropolitan areas. The Commission has been directed by *USTA II* to review the mandate of USTA I that "the Commission may not 'loftily abstract[ ] away from all specific markets,' but must instead implement a 'more nuanced concept of impairment.'"[20] In the interest of developing a more "nuanced concept of impairment," these Comments seek to persuade the Commission that, in Commenters' experience, there are indeed markets in which requesting carriers are impaired, at least for a certain duration of time, without access to unbundled elements. For that reason, Commenters propose the following:

First, the Commission should find that, in the interest of market stability, unbundled

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19 *Id.*

20 *USTA II*, 359 F.3d at 569 (citations omitted).

switching should be preserved during for residential lines for a period of three years following the effective date of the permanent rules.

Second, the Commission should find that, following the three year transition period, requesting carriers are impaired without access to mass market unbundled switching provided to residential customers in central offices within which the requesting carrier serves fewer than a certain threshold number lines. The Commenters believe that 2500 lines reasonably identifies the level below which it is not realistic to expect CLECs to deploy their own switches.

As opposed to transition plans implemented over an arbitrary period of time, a density-based plan best addresses at least three of the key factors that the Commission favors in gauging entry barriers:

- Scale Economies: It goes without saying that line density is the epitome of the type of indicator used to measure economies of scale.
- Sunk Costs: Once the threshold is reached, the new entrant is in a position to generate the cash flow necessary for debt service on large capital investments (particularly the cost of a switches and collocation arrangements), or to attract investment capital for the same purpose. Moreover, with sufficient line density, a new entrant is better insulated from the vagaries of customer turnover, making it safer to incur large suck costs.
- First Mover Advantages: At the suggested threshold, a new entrant is no longer an unknown in the market place, and at that point has the market exposure and depth to counteract more of the first mover advantages of the incumbent.

Moreover, the Commission, while not adopting similar density-based plans, has indicated a familiarity with the concept and did give credence to these plans in its overall reasoning.[21]

It should also be noted that technology advancements will introduce a self-limiting function into CLEC migration plans. As technology makes self-provisioning viable for CLECs serving residential customers in wire centers with decreasing density, the CLECs will wean themselves off of ILEC unbundled switching or risk losing customers to the ILEC or other competitors.

V. CONCLUSION

Accordingly, the Commission should adopt the transitional mechanism described herein.

Respectfully submitted,

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21 *Triennial Review Order* para. 530.